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IN THE

Supreme Court of the United States

October Term, 1982

No. 82-1382

In the Matter of the Application of WALTER TOLUB, individually and on behalf of the Association of Law Secretaries, et al.,

Appellants,

—v.—

HERBERT B. EVANS, et al.,

Appellees.

ON APPEAL FROM THE COURT OF APPEALS
OF THE STATE OF NEW YORK

MEMORANDUM IN OPPOSITION TO MOTION TO DISMISS OR AFFIRM

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Statement

This memorandum is submitted in opposition to the appellees' ~~memorandum~~ to dismiss or affirm. Our jurisdictional statement sets forth the relevant facts in detail. While the appellees have sought to obfuscate the real issue raised here with inaccurate or irrelevant factual material, the appellees do not dispute the following critical facts: The appellants (1) are career [1] law clerks to Justices of the Supreme Court of the State of New York, (2) the Justices for whom they work are employees

[1] Unlike the federal system, the state statutory scheme contemplates that appellants will serve as law clerks for their entire careers.

of the State of New York, and (3) the appellants—as the Court of Appeals acknowledged—receive "less salary" than some of their equally experienced counterparts outside New York City (J.S., App. C, p. 24a). The reason for this disparity is likewise not a matter of dispute. Prior to April 1, 1977, appellants performed the identical work for the State of New York that they perform today. They are nevertheless paid less than their counterparts elsewhere, despite the fact that their salary has been paid by New York State since April 1, 1977, and because it would cost New York State more money to pay them the same salary as their counterparts elsewhere.

The issue presented is whether the justification given for this patently discriminatory treatment is consistent with the protection afforded by the Equal Protection Clause of the Fourteenth Amendment.

ARGUMENT

The appellees, implicitly conceding that such discrimination cannot be justified, begin their defense of the New York State statute here at issue, N.Y. Judiciary Law § 39(8)(b), by arguing that it does not "apply only to the small group of appellants" but "it applied to all 8,500 court employees transferred to the state payroll" on April 1, 1977. Accordingly, they suggest "the real equal protection issue in this appeal is whether the state could reasonably assimilate a massive number of locally-paid court employees into its payroll by preserving their current salaries, if above a statutory minimum, without making every employee's salary equal" (Motion, p. 9).

This is simply a misstatement of the issue. There is no suggestion that the Equal Protection Clause requires that all of the 8500 locally-paid court employees whose salaries were assumed by the State of New York be paid the same salary. The appellants do not seek salary parity

with all of the other locally-paid court employees whose salaries were assumed by New York State. They seek parity with the salary paid to employees who perform the identical duties—law clerks to Justices of the Supreme Court—who were employed by the State of New York at the time the appellants' salary was assumed by the State of New York.

While there may be a rational basis for distinguishing between law clerks or other employees of different courts located in different parts of New York State, the issue here is whether there is a basis for discriminating between two identically classified sets of employees: law clerks of the same court—the New York State Supreme Court—where the disadvantaged group works in a locale of New York State in which the work is far more difficult and complex and in which the cost of living is higher than where their higher paid counterparts work.

Because such discrimination cannot be justified, appellees, have sought to distort the record and obfuscate the real issue presented by this case. We proceed to respond to their specific arguments.

1. The appellees argue that there are "no material disparities in total compensation between appellants and prior state-paid law clerks" (Motion, p. 10). This is simply not true. While the opinion of the New York State Supreme Court Justice who rejected appellants' claim contained a brief conclusory statement to that effect at the outset of her opinion,[2] the New York Court of Appeals

[2] The appellees refer to Justice Gabel as the "trial court". There was, however, no trial here. The case was decided on the pleadings and affidavits. And appellants' affidavits demonstrated that, when calculating the value of fringe benefits by their cost to the employer, their total package of benefits and salaries was still significantly less than those of prior state-paid employees. Of course, to the extent appellees disputed this conclusion, the lower court erred in deciding the contested issue of fact on the papers. (Record on Appeal to New York Court of Appeals, pp. 162-164, 214-17.)

did not base its holding on the ground that "there are no material disparities in total compensation between appellants and prior state-paid law clerks". The majority opinion simply alluded to the fringe benefits appellants were permitted to retain, when they were placed on the State payroll, as supporting the conclusion "that the Legislature considered the total cost of the unification of the court system in enacting the various transitional provisions" (J.S. 25a).

While we are at a loss to understand the significance of this observation, it is plain that (a) the record does not support the claim that there were "no material disparities in the total compensation between appellants" and their counterparts elsewhere, (b) the appellees can cite no more than a conclusory statement in the opinion of the New York State Supreme Court Justice to support their claim, and (c) the Court of Appeals did not base its holding on that ground.

2. The appellees next argue that the New York statutory scheme at issue achieved "a broad equalization of salaries" by requiring "an identity of salary *grades*—not of salary" (Motion, p. 11). This argument is frivolous. While it is true that the same standards were employed in determining the salary grade in which appellants and their counterparts elsewhere would be placed, there is a wide disparity of salary within a grade depending on years of service. In determining which salary, within grade 31, law clerks to Justices of the Supreme Court would receive, appellants' prior years of service counted for nothing, while the salaries of their counterparts were increased based on their prior years of service. The argument that this effectuated "a broad equalization of salaries" simply flies in the face of the record.[3] Thus, for

[3] Of course, not even the majority in the Court of Appeals relied on this as a basis for sustaining the statutory scheme.

example, effective April 1, 1977, the salaries within grade 31 alone ranged from $27,842 to $31,642 [Judiciary Law, § 38(1)(a)]. To argue that two individuals are receiving "equal" salaries where one receives nearly $4,000 a year less than another simply because they both are assigned to the same arbitrarily defined "grade," is nonsense. The Equal Protection Clause is simply not satisfied by characterizing unequal treatment as "broadly" equal.

3. The appellees argue that the appellants are not "similarly situated" to prior "state-paid law clerks" because—prior to April 1, 1977—when they were placed on the payroll of New York State, their salary was determined in a different way than the salary of their counterparts elsewhere (Motion, p. 13-14). The prior anomalous statutory scheme, by which appellants were paid by New York City, even though they worked for New York State, cannot possibly provide a rational basis for continued discrimination against them now that they are employees of New York State. Indeed, here again, the appellees have sought to avoid the force of this argument by reframing the appellants' argument. The appellees claim that "all groups of law clerks throughout the State are different" because their salaries are the product of collective bargaining agreements "and that the appellants cannot pick and choose the group of similarly-graded law clerks with whom they wish to have parity" (Motion, p. 14).

The fact is, however, appellants' salary was not the product of a collective bargaining agreement with New York State, because they were not employed by New York State prior to April 1, 1977.[4] More significantly, appellants seek parity only with respect to the only other group of law clerks who, like themselves, worked, at all relevant times, for Justices of the Supreme Court of the

[4] Appellants were not part of a collective bargaining group while in New York City service either.

State of New York and performed the same duties that they did. Indeed, they recognize that there may be a rational basis to distinguish between themselves and law clerks employed in different courts. The distinction, however, would suggest that appellants be paid a greater salary, not a lesser amount.

4. The appellees' last argument—that the discrimination here challenged is "rationally related to the achievement of valid governmental objectives" (Motion, p. 15) assumes that the issue is whether all 8500 locally-paid employees who became New York State employees had to be paid the same—or a particular—salary (Motion, p. 16). We have already shown that this assumption does not accurately reflect appellants' position. The issue is not whether the Legislature was required "to expend the tens of millions of dollars to equalize everybody's salary by allocating the titles of 8,500 employees to salary grades on the basis of prior years of local service" (Motion, p. 18), it is simply whether all law clerks to Justices of the Supreme Court of the State of New York, who have the same qualifications and years of professional experience, should be paid the same salary.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

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